

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAMES E. BOYD,	)	
	)	No. CV-10-0196-CI
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND DIRECTING ENTRY OF
MICHAEL J. ASTRUE,	)	JUDGMENT FOR DEFENDANT
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 18.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents Defendant. The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

Plaintiff protectively filed for Supplemental Security Income (SSI) on May 15, 2007. (Tr. 137.) He alleged disability due to attention deficit disorder (ADD), anxiety, depression, and post-traumatic stress disorder, with an onset date of October 24, 1990. (Tr. 122, 142.) Following a denial of benefits at the initial stage and on reconsideration, Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Gene Duncan on December 8, 2008. (Tr. 33-84.) On April 14, 2009, ALJ

1 Duncan denied benefits; review was denied by the Appeals Council.  
2 (Tr. 1-4, 19-32.) This appeal followed. Jurisdiction is  
3 appropriate pursuant to 42 U.S.C. § 405(g).

#### 4 STANDARD OF REVIEW

5 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
6 court set out the standard of review:

7 The decision of the Commissioner may be reversed only if  
8 it is not supported by substantial evidence or if it is  
9 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,  
10 1097 (9th Cir. 1999). Substantial evidence is defined as  
11 being more than a mere scintilla, but less than a  
12 preponderance. *Id.* at 1098. Put another way, substantial  
13 evidence is such relevant evidence as a reasonable mind  
14 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
15 evidence is susceptible to more than one rational  
16 interpretation, the court may not substitute its judgment  
17 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
18 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,  
19 599 (9th Cir. 1999).

20 The ALJ is responsible for determining credibility,  
21 resolving conflicts in medical testimony, and resolving  
22 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
23 Cir. 1995). The ALJ's determinations of law are reviewed  
24 *de novo*, although deference is owed to a reasonable  
25 construction of the applicable statutes. *McNatt v. Apfel*,  
26 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 27 SEQUENTIAL PROCESS

28 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
requirements necessary to establish disability:

Under the Social Security Act, individuals who are  
"under a disability" are eligible to receive benefits. 42  
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
medically determinable physical or mental impairment"  
which prevents one from engaging "in any substantial  
gainful activity" and is expected to result in death or  
last "for a continuous period of not less than 12 months."  
42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
from "anatomical, physiological, or psychological  
abnormalities which are demonstrable by medically  
acceptable clinical and laboratory diagnostic techniques."  
42 U.S.C. § 423(d)(3). The Act also provides that a

1 claimant will be eligible for benefits only if his  
2 impairments "are of such severity that he is not only  
3 unable to do his previous work but cannot, considering his  
4 age, education and work experience, engage in any other  
5 kind of substantial gainful work which exists in the  
6 national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
7 the definition of disability consists of both medical and  
8 vocational components.

9 In evaluating whether a claimant suffers from a  
10 disability, an ALJ must apply a five-step sequential  
11 inquiry addressing both components of the definition,  
12 until a question is answered affirmatively or negatively  
13 in such a way that an ultimate determination can be made.  
14 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
15 claimant bears the burden of proving that [s]he is  
16 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
17 1999). This requires the presentation of "complete and  
18 detailed objective medical reports of h[is] condition from  
19 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
20 404.1512(a)-(b), 404.1513(d)).

#### 21 STATEMENT OF FACTS

22 The facts of the case are set forth in detail in the transcript  
23 of proceedings, and are briefly summarized here. Plaintiff was 45  
24 years old at the time of the administrative hearing and living in a  
25 homeless shelter. (Tr. 36-37, 66.) He testified he had a high  
26 school education and community college courses in culinary arts and  
27 printing. (Tr. 37.) Plaintiff reported a history of substance  
28 abuse, drug related incarcerations, and chemical dependency  
treatment. (Tr. 324.) He stated he had past work experience as a  
cook and kitchen helper, but could not maintain employment because  
he did not get along with people, had problems with anger  
management, and was unmotivated. (Tr. 51, 58-60.)

#### ADMINISTRATIVE DECISION

At step one, ALJ Duncan found Plaintiff had not engaged in  
substantial gainful activity since application date, May 15, 2007.  
(Tr. 21.) At step two, he found Plaintiff has severe impairments of

1 asthma, obesity, and personality disorder. (*Id.*) He gave a  
2 detailed summary of the medical evidence, and found Plaintiff's  
3 diagnosed adjustment disorder and migraine headaches were not severe  
4 impairments. (Tr. 27.) At step three, he found Plaintiff's  
5 impairments alone and in combination did not meet or equal the  
6 requirements of a listed impairment in 20 C.F.R., Part 404, Subpart  
7 P, Appendix 1 (Listings). The ALJ discussed Plaintiff's testimony  
8 and concluded Plaintiff's statements about his symptoms and  
9 limitations were inconsistent, exaggerated, and not credible. (Tr.  
10 29-30.) At step four he found Plaintiff could perform medium work  
11 with the following restrictions:

12 He should not operate moving machinery. He should avoid  
13 exposure to dust, fumes, odors and gases. He is capable  
14 of simple, routine work with occasional, superficial  
15 coworker and public interaction. He can work  
16 independently but not in coordination with coworkers. He  
17 can occasionally have contact with supervisors. He should  
18 work with objects, not people. He should not work where  
there is direct access to drugs or alcohol. He is not  
capable of security work or where he would be in charge of  
the safety of others. He is not capable of prolonged  
reading for context and comparison. There should be few  
changes in the work environment. He could be expected to  
be off-task 3% of the time.

19 (Tr. 28.) At step four, based on the entire record and VE  
20 testimony, the ALJ found Plaintiff's RFC permits him to perform his  
21 past relevant work as a kitchen helper; therefore, Plaintiff was not  
22 under a disability as defined by the Social Security Act. (Tr. 31-  
23 32.)

#### 24 ISSUES

25 The question presented is whether there was substantial  
26 evidence to support the ALJ's decision denying benefits and, if so,  
27 whether that decision was based on proper legal standards. Plaintiff  
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1 contends the ALJ erred when he: (1) found Plaintiff's depression and  
2 anxiety disorders were not severe impairments; (2) improperly  
3 rejected examining psychologists' opinions; (3) did not give  
4 sufficient weight to his treating nurse practitioner's opinions; and  
5 (4) improperly relied on medical expert testimony. (ECF No. 14.)

## 6 DISCUSSION

### 7 A. Step Two Findings

8 To satisfy step two's requirement of a severe impairment, the  
9 claimant must prove the existence of a physical or mental impairment  
10 by providing medical evidence consisting of signs, symptoms, and  
11 laboratory findings; the claimant's own statement of symptoms alone  
12 will not suffice. 20 C.F.R. § 416.908. The credible medical  
13 evidence must also show that the impairment (1) causes functional  
14 limitations that have more than a minimal effect on Plaintiff's  
15 ability to do work activities, and (2) last more than 12 months. 20  
16 C.F.R. §§ 404.1509, 416.909; *Social Security Ruling (SSR)* 96-03p.  
17 The fact that a medically determinable condition exists does not  
18 automatically mean the symptoms are "severe," or "disabling" as  
19 defined by the Social Security regulations. *See, e.g., Edlund*, 253  
20 F.3d at 1159-60; *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989);  
21 *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9<sup>th</sup> Cir. 1985). An impairment  
22 may be found to be "non-severe" when evidence establishes a slight  
23 abnormality that has no more than "a *minimal effect* on an  
24 individual's ability to work." (*SSR*) 85-28).

25 In determining whether a claimant has a severe impairment the  
26 ALJ must evaluate the medical evidence submitted and explain the  
27 weight given to the opinions of accepted medical sources in the  
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1 record. The regulations distinguish among the opinions of three  
2 types of accepted medical sources: (1) sources who have treated the  
3 claimant; (2) sources who have examined the claimant; and (3)  
4 sources who have neither examined nor treated the claimant, but  
5 express their opinion based upon a review of the claimant's medical  
6 records. 20 C.F.R. § 416.927. A treating physician's opinion  
7 carries more weight than an examining physician's, and an examining  
8 physician's opinion carries more weight than a non-examining  
9 reviewing or consulting physician's opinion. *Benecke v. Barnhart*,  
10 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Lester v. Chater*, 81 F.3d 821,  
11 830 (9<sup>th</sup> Cir. 1995).

12 In addition, courts have upheld an ALJ's decision to reject the  
13 opinion of an examining physician based in part on the testimony of  
14 a non-examining medical expert. *Lester*, 81 F.3d at 831. The analysis  
15 and opinion of an expert selected by the ALJ may be helpful in his  
16 adjudication, and the court should not second guess the ALJ's  
17 resolution of conflicting medical testimony. *Andrews*, 53 F.3d at  
18 1041, *citing Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989).  
19 Further, testimony of a medical expert may serve as substantial  
20 evidence when supported by and consistent with other evidence in the  
21 record. *Id.*

22 Even though medical evidence only is considered at step two,  
23 credibility is an appropriate factor to consider in evaluating the  
24 medical evidence submitted. When there are conflicts in the various  
25 medical reports submitted or questions of credibility, it is the  
26 responsibility of the ALJ to resolve those conflicts. *Thomas v.*  
27 *Barnhart*, 278 F.3d 947, 956 (9<sup>th</sup> Cir. 2002). Where the evidence is  
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1 susceptible to more than one rational interpretation, the findings  
2 of the ALJ will be upheld. *Id.* at 954.

3 Plaintiff contends the ALJ failed to include diagnosed  
4 affective disorder or adjustment disorder as severe impairments at  
5 step two. (ECF No. 14 at 11.) He argues the evaluations completed  
6 by psychologists Jay Toews, Ed.D., Frank Rosekrans, Ph.D., and  
7 Dennis Pollack, Ph.D., are sufficient to establish step two severity  
8 for these impairments. Specifically, he argues the examining  
9 psychologists opined limitations caused by his affective disorders  
10 (adjustment disorder and depression) caused more than mild  
11 limitations in his functional capabilities. He also contends the  
12 ALJ erred in the weight given ARNP Teresa Colley's opinions that  
13 Plaintiff has severe depression and generalized anxiety disorder  
14 that preclude successful employment. (*Id.* at 13-14.)

15 The record shows prior to the December 8, 2008, administrative  
16 hearing, Dr. Toews examined Plaintiff and diagnosed methamphetamine  
17 dependence and polysubstance abuse in early full remission (by  
18 history); adjustment disorder with mild anxiety and depressed mood  
19 (mild); malingering memory problems (probable); and antisocial  
20 personality features. (Tr. 247.) To assist in interpreting the  
21 psychological test scores and medical findings, the ALJ obtained  
22 medical expert testimony from Ronald Klein, Ph.D. As Plaintiff  
23 points out, after the hearing, additional psychological evaluations  
24 were completed by Drs. Toews, Pollack, and Rosekrans and submitted  
25 to the ALJ. (Tr. 310-22, 323-27, 330-36.) Plaintiff contends the  
26 ALJ erroneously relied on Dr. Klein's testimony because Dr. Klein  
27 did not review these later reports. (ECF 14 at 16.) This contention

1 is unsupported by the ALJ's findings, the regulations, and case law.

2 Where there is conflicting medical evidence, it is the sole  
3 responsibility of the ALJ, not the medical expert, to resolve those  
4 conflicts. *Sample v. Schweiker*, 694 F.2d 639, 642 (9<sup>th</sup> Cir. 1982).  
5 While the analysis and opinion of an expert selected by an ALJ may  
6 be helpful in his adjudication, the ALJ's resolution of conflicting  
7 medical testimony is not dependent upon the medical expert's  
8 testimony. *Id.* There is no requirement that the ALJ substitute the  
9 judgment of a medical expert for his own. *Id.*; see also 20 C.F.R.  
10 § 416.927(e)(2)(no special significance given to medical opinions on  
11 issues of severity of impairment or RFC).

12 Here, although the ALJ indicated he gave "great weight" to Dr.  
13 Klein's testimony, he did not rely on Dr. Klein's testimony in  
14 making the step two or RFC findings. (Tr. 31.) Significantly, the  
15 ALJ's step two and RFC findings do not reflect Dr. Klein's opinions  
16 that Plaintiff's mental impairments cause "no impairment of  
17 activities of daily living, mild impairment in social function, mild  
18 impairment in concentration, persistence and pace, and no episode of  
19 decompensation." (Tr. 41.)

20 Independent review shows the ALJ considered all probative  
21 medical evidence and did not adopt Dr. Klein's opinions regarding  
22 impairment severity. The ALJ thoroughly summarized the pre and  
23 post-hearing evaluations from Dr. Toews, post-hearing evaluations  
24 from Drs. Rosekrans and Pollack, as well as Ms. Colley's opinions,  
25 gave his interpretation of the evidence, and made findings. (Tr.  
26 21-27.) The ALJ found Plaintiff's personality disorder is severe  
27 and the diagnosed adjustment disorder was non-severe; the  
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1 Commissioner's final RFC findings include restrictions to address  
2 Plaintiff's mild to moderate social and cognitive functional  
3 limitations caused by the severe and non-severe impairments alone  
4 and in combination.<sup>1</sup> (Tr. 28.) As discussed below, the ALJ gave  
5 legally sufficient reasons for the weight given acceptable medical  
6 source opinions and Ms. Colley's opinions. The ALJ's reasoning is  
7 supported by substantial medical evidence in the entire record, as  
8 well as inferences "logically flowing from the evidence." *Sample*,  
9 694 F.2d at 642. Thus, Plaintiff's argument that the ALJ  
10 erroneously relied on Dr. Klein's testimony at step two fails.

11 Nonetheless, Dr. Klein did assist the ALJ in interpreting  
12 psychological test scores that indicated Plaintiff was "deliberately  
13 attempting to distort cognitive and memory function." (Tr. 30.)  
14 Other evidence record amply supports Dr. Klein's opinions regarding  
15 the reliability of psychological testing used to evaluate  
16 Plaintiff's mental condition and the interpretation of test results.  
17 The ALJ did not err in relying on Dr. Klein's testimony that  
18 Plaintiff is unmotivated to work and not credible, but he is not  
19 disabled. (*Id.*)

#### 20 **B. Rejection of Acceptable Medical Opinions**

21 The Commissioner must provide "clear and convincing" reasons  
22 for rejecting uncontradicted opinions of a treating or examining  
23 physician. *Lester*, 81 F.3d at 830 (citation omitted). If the  
24 opinion is contradicted, it can only be rejected for specific and  
25 legitimate reasons that are supported by substantial evidence in the

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26 <sup>1</sup> Mental disorders under Listing 12.04 (*Affective Disorders*)  
27 include adjustment disorder and depression.  
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1 record. *Andrews*, 53 F.3d at 1043. The ALJ can meet this burden by  
2 giving a detailed and thorough summary of the facts and conflicting  
3 clinical evidence, state his interpretation of the evidence, and  
4 make findings. *Thomas*, 278 F.3d at 957. In any case, the ALJ is  
5 not obliged to accept the opinion of a medical source if the opinion  
6 is inadequately supported by clinical findings. *Thomas*, 278 F.3d at  
7 956.

8 Here, after a thorough summary of the medical evidence, the ALJ  
9 gave specific and legitimate reasons for rejecting the examining  
10 medical source opinions that limitations caused by Plaintiff's  
11 diagnosed affective/adjustment disorder caused more than minimal  
12 limitations in his cognitive and social functioning.

13 **1. Dr. Toews**

14 Dr. Toews evaluated Plaintiff in July 2007 and March 2009.  
15 Both evaluations were summarized by the ALJ. (Tr. 30.) As found by  
16 the ALJ, in 2007, Dr. Toews diagnosed drug abuse, adjustment  
17 disorder with mild anxiety and mild depressed mood, and antisocial  
18 personality features. He specifically opined there were no symptoms  
19 indicating PTSD, ADD, major depression, or dysthymia. (Tr. 24, 247.)  
20 Dr. Toews also found significant evidence of malingering in the  
21 objective psychological testing and during the mental status exam.  
22 (Tr. 24, 30, 246.) The ALJ noted Dr. Toews' conclusion that  
23 Plaintiff was having typical problems related to adapting to the  
24 community after incarceration and substance abuse treatment, and  
25 "his affective and personality functioning would be adversely  
26 affected by substance abuse." (Tr. 24, 247.) Dr. Toews concluded  
27 Plaintiff could comprehend 2-3 step instruction, could perform  
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1 routine and repetitive types of jobs and could function at a normal  
2 pace, with sustained attention and concentration over time. He  
3 specifically noted Plaintiff would have problems working with people  
4 as a team. (Tr. 246.) These diagnoses and limitations are  
5 reflected in the ALJ's RFC determination. (Tr. 28.)

6 In March 2009, Dr. Toews evaluated Plaintiff again. (Tr. 323-  
7 37.) As reflected in the ALJ's summary, although Plaintiff reported  
8 severe functional limitations, Dr. Toews noted Plaintiff's mental  
9 status exam was within a normal range, his reported seizures were  
10 drug-related, and self-reported limitations were due to lack of  
11 motivation. (Tr. 323-24.) He observed Plaintiff's attention and  
12 concentration were "grossly normal," he was cognitively intact, and  
13 "appeared to function in the borderline range of intelligence."  
14 (Tr. 27, 323-34.) Significantly, Dr. Toews administered a test to  
15 detect malingering, the results of which indicated "a high  
16 likelihood of malingering." (Tr. 326.) As noted by Dr. Toews,  
17 Plaintiff "endorsed a large number of items on all scales which are  
18 atypical of disorders in each of the domains," indicating a high  
19 probability of feigning severe psychiatric, neurological, cognitive  
20 and affective symptoms."<sup>2</sup> (Tr. 326.) Nonetheless, in contrast to  
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22  
23 <sup>2</sup> In his summary of the medical evidence, from which the court  
24 can draw inferences, the ALJ noted testimony from Dr. Klein that is  
25 consistent with this portion of Dr. Toews' second evaluation.  
26 Specifically, Dr. Klein testified that test results from the various  
27 psychological evaluations were inconsistent, indicated impairments  
28 that would require an individual to be institutionalized, and

1 the first evaluation in which malingering was present, Dr. Toews  
2 diagnosed a cognitive disorder; major depressive disorder,  
3 recurrent, with PTSD features; learning disorder; personality  
4 disorder; and borderline intellectual functioning, and opined it was  
5 unlikely Plaintiff could adjust to simple, routine, and repetitive  
6 employment. (Tr. 326-27.) The ALJ summarized Dr. Toews' findings,  
7 and rejected specific opinions contained in the second evaluation  
8 because: (1) Dr. Toews failed to explain the significant change in  
9 his opinion; (2) the longitudinal record did not show a change in  
10 circumstances to support Dr. Toews revised opinions; and (3) the  
11 revised opinions were based on Plaintiff's inconsistent and  
12 exaggerated information. (Tr. 30-31.) These legally sufficient  
13 reasons are supported by substantial evidence.

14 **2. Dr. Rosekrans**

15 The ALJ summarized evaluations signed by Dr. Rosekrans in  
16 January 9, 2008, and January 30, 2009, noting findings of mild  
17 limitations in cognitive factors and moderate to marked limitations  
18 in social factors. (Tr. 23, 26.) As found by the ALJ, at the time  
19 of the January 2008 evaluation, Plaintiff reported his last drug/  
20 alcohol use was 35 days prior to the evaluation. (Tr. 23, 294.)  
21 Dr. Rosekrans and his associate, Dr. Maua, diagnosed polysubstance  
22 dependence with recent abuse, adjustment disorder, with mixed  
23 anxiety and depressed mood, and antisocial disorder. (Tr. 295.)  
24 They also opined Plaintiff "was not likely to succeed in the  
25 workforce at that time," recommended re-evaluation of his depression  
26  
27 Trailmaking scores were so poor "that even people after a stroke  
28 don't do that poorly." (Tr. 25, 42-43.)

1 and anxiety after drug treatment and 90 days of sobriety. (*Id.*)  
2 The ALJ properly discounted limitations assessed in 2008, as the  
3 evaluators indicated Plaintiff's self-reported substance abuse made  
4 it difficult to assess the nature of his mental impairments. See  
5 *Parra v. Astrue*, 481 F.3d 742, 744 (9<sup>th</sup> Cir. 2007) (disability  
6 benefits precluded where substance abuse is contributing factor  
7 material to alleged disability).

8 In his second evaluation, Dr. Rosekrans reviewed reports from  
9 prior examinations and noted that Dr. Moua examined Plaintiff in  
10 August 2008, at which time Plaintiff reported cocaine and alcohol  
11 use three weeks prior to the interview and indicated he was in  
12 outpatient treatment and "thought inpatient treatment might be  
13 necessary."<sup>3</sup> (Tr. 334.) As noted by the ALJ, Dr. Rosekrans also  
14 referenced the November 2008 evaluation by Dr. Pollack in which  
15 Plaintiff denied alcohol use and made no mention of substance abuse.  
16 (Tr. 26, 334-35.) This lack of candor regarding substance abuse  
17 significantly decreases the credibility of Plaintiff's statements to  
18 Dr. Pollack. *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9<sup>th</sup> Cir. 1999).  
19 Dr. Pollack administered objective psychological tests and diagnosed  
20 malingering, alcohol dependence in remission, and personality  
21 disorder with antisocial and paranoid features. (Tr. 335.) Dr.  
22 Rosekrans appears to have relied on Dr. Pollack's test results,  
23 which as discussed below, were rejected by the ALJ because of  
24 significant evidence of malingering throughout the testing. (Tr.  
25 336.)

26 In the second evaluation with Dr. Rosekrans, Plaintiff

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27 <sup>3</sup> This evaluation does not appear to be in the record.  
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1 reported he had been clean and sober for four months, without  
2 treatment. He scored in the normal range on his mini-mental status  
3 exam and on Trails A and B (compared to a severely impaired score in  
4 the Trails B the year before). (Tr. 335, 294.) He reported no  
5 difficulty with his activities of daily living on the streets or in  
6 the homeless shelter. In the accompanying checkbox evaluation form,  
7 Dr. Rosekrans opined Plaintiff had no limits in his ability to  
8 understand and follow simple instructions or perform routine task;  
9 moderate limitations in the remaining cognitive factors, and  
10 moderate to marked limitations in his social functioning. (Tr.  
11 332.) The ALJ incorporated the cognitive limitations into his RFC  
12 assessment, and discounted moderate and marked limitations noted  
13 because they were inconsistent with other evidence and based on  
14 Plaintiff's incredible statements. (Tr. 31.) These reasons are  
15 specific and legitimate and supported by the ALJ's unchallenged  
16 credibility findings and ample evidence throughout the record of  
17 Plaintiff's malingering, exaggeration of symptoms, and inconsistent  
18 statements. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir.  
19 2001) (medical opinions properly rejected if based on a claimant's  
20 unreliable statements).

### 21 **3. Dr. Pollack**

22 Plaintiff argues the ALJ failed to give a specific, legitimate  
23 reason for rejecting Dr. Pollack's evaluation. (ECF No. 14 at 20.)  
24 However, Plaintiff fails to support this argument with analysis or  
25 case law. *Carmickle v. Comm of Soc Sec*, 533 F.3d 1155, 1161 n.2  
26 (2008) (court unable to consider issue that is not "specifically and  
27 distinctly argued"). Independent review shows the ALJ met his  
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1 burden by summarizing Dr. Pollack's post-hearing evaluation, noting  
2 Dr. Pollack's finding that Plaintiff's elevated F-scale core that  
3 "was off the graph," and made the personality test uninterpretable.  
4 (Tr. 26.) Based on Plaintiff's interview (because the objective  
5 personality test was invalid), Dr. Pollack opined Plaintiff had  
6 moderate to marked limitations in his mental functioning. (Tr. 26,  
7 320.) The ALJ specifically rejected Dr. Pollack's opinions because  
8 of the malingering diagnosis. (Tr. 31.) This is a specific and  
9 legitimate reason to reject an examining source, and the objective  
10 findings in Dr. Pollack's own report, as well as other affirmative  
11 evidence of malingering in the record support this reason.  
12 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9<sup>th</sup> Cir. 2008);  
13 *Tonapetyan*, 242 F.3d at 1149; *Fair*, 885 F.2d at 605.

14 **C. "Other Source" Opinions.**

15 The record shows Teresa Colley, ARNP at Grace Clinic, provided  
16 medical care for Plaintiff while he was in treatment and recovery  
17 for cocaine and alcohol dependency at Sunray Court. Treatment notes  
18 and correspondence by Ms. Colley are from May and July 2007, and  
19 February and March 2008. (Tr. 231, 239, 277, 280, 297-98, 301.)  
20 Ms. Colley assessed depression and prescribed anti-depressants.<sup>4</sup> On  
21 February 2, 2008, after Plaintiff was denied state benefits, Ms.

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22 <sup>4</sup> Plaintiff asserts that "doctors" at Grace Clinic "continually  
23 diagnosed Mr. Boyd with depression and anxiety." (ECF 20 at 2.)  
24 However, the records cited by Plaintiff to support this allegation  
25 are signed by ARAP Colley, who is not an acceptable medical source  
26 qualified to provide a diagnosis. *Nguyen v. Chater*, 100 F.3d 1462,  
27 1467 (9<sup>th</sup> Cir. 1996).  
28

1 Colley wrote a letter opining Plaintiff was severely depressed and  
2 needed medical coverage to address mental health issues "stemming  
3 from substance abuse." (Tr. 297.) She opined that Plaintiff's  
4 depression, in combination with substance abuse and his diagnosed  
5 anti-social personality disorder would "present severe difficulties  
6 to employment." (Tr. 298.)

7 Plaintiff contends this evidence is sufficient to establish his  
8 depression as a severe impairment. However, Ms. Colley is not an  
9 acceptable medical source qualified to establish a medically  
10 determinable impairment for Social Security disability purposes.  
11 Instead, as a nurse practitioner, her opinions must be considered by  
12 the ALJ in assessing the impact a diagnosed impairment has on work  
13 related functioning. 20 C.F.R. § 416.927, .913(d); *Lewis v. Apfel*,  
14 236 F.3d 503, 511 (9<sup>th</sup> Cir. 2001); *Nguyen*, 100 F.3d at 1467.

15 The ALJ specifically considered Ms. Colley's opinion that  
16 Plaintiff's anxiety and antisocial personality disorder presented  
17 severe difficulties to employment. (Tr. 30.) He properly disregarded  
18 her diagnoses because she is not an acceptable medical source. *Id.*  
19 20 C.F.R. § 416.913, .927; *SSR 06-03p*. Regarding symptoms, the ALJ  
20 referenced Ms. Colley's treatment notes from February 19, 2008, in  
21 which Plaintiff reported decreased anxiety and depression symptoms  
22 with medication. (Tr. 23, 30, 301.) He gave little weight to Ms.  
23 Colley's opinions that Plaintiff's mental disorders "presented  
24 severe difficulties to employment," because her opinions were based  
25 on an outdated assessment tool and Plaintiff's unreliable  
26 statements. (Tr. 30.) These specific reasons, "germane" to Ms.  
27 Colley, are supported amply by the record. *Nguyen*, 100 F.3d at  
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1 1467. As explained by Dr. Klein, the *Zung Self-Rating Depression*  
2 *Scale* used by Ms. Colley to assess Plaintiff is an outdated  
3 questionnaire, and there are more competent ways to assess  
4 depression. (Tr. 49-50, 232-34.) As indicated by its name and  
5 instructions, the *Zung* test is a screening tool only, is not used as  
6 a diagnostic device, and is reliant upon self-report. (Tr. 234.)

7 Citing SSR 06-03p, Plaintiff argues Ms. Colley's opinions  
8 should have been given greater weight because she saw Plaintiff more  
9 than anyone else. (ECF No. 14 at 17.) In SSR 06-03p, the  
10 Commissioner directs that certain factors must be considered in the  
11 evaluation of other source opinions, e.g., their professional  
12 qualifications, how consistent their opinions are with the other  
13 evidence, the amount of evidence provided in support of their  
14 opinions, whether the other source opinion is well explained, and  
15 whether the other source "has a specialty or area of expertise  
16 related to the individual's impairment." SSR 06-03p. However, Ms.  
17 Colley's clinic notes do not evidence a lengthy treating  
18 relationship with Plaintiff, or establish that Ms. Colley has  
19 specialized training in mental disorders. Further, the record shows  
20 Ms. Colley had limited contact with Plaintiff while he was being  
21 treated for substance abuse in May and July of 2007 and February  
22 2008. (Tr. 231-41, 275-81, 296-98.) Substantial evidence supports  
23 the weight given Ms. Colley's other source opinions.

24 **D. Final RFC Determination**

25 The final determination regarding a claimant's ability to  
26 perform basic work is the sole responsibility of the Commissioner.  
27 20 C.F.R. § 416.946; SSR 96-5p (RFC assessment is an administrative  
28

1 finding of fact reserved to the Commissioner). No special  
2 significance is given to a medical source opinion on issues reserved  
3 to the Commissioner. 20 C.F.R. §§ 404.1527(e), 416.927(e). The ALJ  
4 is "responsible for determining credibility, resolving conflicts in  
5 medical testimony and for resolving ambiguities." *Richardson*, 402  
6 U.S. at 400; *Andrews*, 53 F.3d at 1039; *SSR* 96-8p.

7 Here, the ALJ's finding that no medical source can evaluate  
8 Plaintiff's mental condition because of his malingering,  
9 exaggeration of symptoms and inconsistent statements is supported by  
10 substantial evidence in the record and is unchallenged. Every  
11 examining psychologist noted objective test scores indicating  
12 invalid test results and/or clear malingering. Plaintiff's  
13 statements regarding limitations, past work history, and drug and  
14 alcohol use are inconsistent throughout the record. The ALJ's  
15 final RFC determination reflects a careful consideration of medical  
16 evidence establishing a diagnosis of anti-social personality  
17 disorder, non-severe impairments, limitations supported by the  
18 record, and Plaintiff's credible statements regarding his ability to  
19 be around people, his past employment, and past living arrangements.  
20 Because the final RFC determination is supported by substantial  
21 evidence and is a rational interpretation of the entire record, it  
22 may not be disturbed.

23 The hearing transcript also shows the ALJ propounded two  
24 hypothetical questions with limitations supported by the record,  
25 including "no prolonged reading for context or comprehension,"  
26 superficial contact with co-workers, and being "off task" three  
27 percent throughout the day. (Tr. 79.) The VE opined the individual  
28

1 could still perform the kitchen helper job. (Tr. 79-80.) Because  
2 the VE's testimony is based on functional limitations supported by  
3 the record, his opinions are considered substantial evidence.  
4 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9<sup>th</sup> Cir. 2005). The ALJ's  
5 final determination that Plaintiff can perform past work as a  
6 kitchen helper and is not under a disability is a rational  
7 interpretation of the evidence in its entirety, and the court may  
8 not substitute its judgment for that of the Commissioner. *Tackett*,  
9 180 F.3d at 1097. Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is  
12 **DENIED.**

13 2. Defendant's Motion for Summary Judgment dismissal (**ECF**  
14 **No. 18**) is **GRANTED.**

15 The District Court Executive is directed to file this Order and  
16 provide a copy to counsel for Plaintiff and Defendant. The file  
17 shall be **CLOSED** and judgment entered for Defendant.

18 DATED September 7, 2011.

19  
20 S/ CYNTHIA IMBROGNO  
21 UNITED STATES MAGISTRATE JUDGE  
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